IN THE

Supreme Court of the United States

October Term, 1965

No. 1106

NATIONAL LAWYERS GUILD,

Petitioner,

vs.

Ramsey Clark, Jr., Attorney General of the United States,

Respondent.

PETITION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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vs.

HERBERT BROWNELL, JR., Attorney General of the United States,

Respondent.

PETITION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

The undersigned are members of the California bar. We are profoundly concerned with the effects upon an independent bar of the action proposed against the National Lawyers Guild by the Attorney General.

Involved are not simply questions dealing with the preservation of freedoms guaranteed in the Bill of Rights, but also the freedom of lawyers to discharge their professional responsibilities to clients and to associate together in societies pursuing legitimate professional interests. An examination of the petition for writ of *certiorari* filed herein indicates that the latter question has not been adequately covered by the parties.

We ask leave to file this brief as Friends of the Court so that the question may be presented to the Court. In our view the proper consideration of this question alone would justify the issuance of the writ.

The signers of this brief are members of the Bar of the State of California who believe that good government and a free nation cannot exist without a free and independent Bar. None of us is a member of the National Lawyers Guild. We are gravely concerned that the position of the Attorney General in respect of the Guild menaces the independence of the profession.

The Proposed Grounds for Designation.

As we apprehend the grounds for the proposed designation of the Guild, they consist of these: that the Guild's position in public debate and before the legislatures of the land on questions involving political and civil rights parallels that of the Communist Party; that some members of the Guild have opposed the Attorney General in litigation involving persons and organizations holding unpopular political views; that some members and leaders of the Guild are Communists or "fellow travelers"; and that the Guild has appeared *amicus curiae* opposing the Attorney General in the courts. We understand that upon such grounds the Attorney General proposes to designate as subversive a bar association that has carried on its activities on a national basis for nearly 20 years. We deem it natural to suppose (as did this Court in *Joint Anti-Fascist Committee v. McGrath*, 341 U. S. 123) that so to denominate any organization that owes its life to the good will and support of citizens will effect its destruction—the more so when the organization is made up of lawyers whose very professional status is so intimately related to the public welfare.

The Lawyer's Right to Associate in Professional Societies.

One may well ask upon what authority an appointive officer of the federal government essays to offer judgment upon any bar association in the area of opinion and belief. Traditionally, the right of lawyers to associate in professional societies has not turned upon governmental approval of the views of its members or the activities of their society. The grounds of the Attorney General's action pertain largely to the positions advanced by the professional organization before the courts and legislatures of the land. Whatever the merits of such positions, it can hardly be urged that to present them to the properly constituted organs of government threatens the security of the republic. On the contrary, our institutions are bottomed upon the premise that the freedom of lawyers to advocate such views as their reason and legal training commend to them is the bedrock of individual liberty. Experience demonstrates that there is an essential inter-connection between an independent bar and a free people. Neither will survive when the lawyer's freedom to associate is made dependent upon government approval of the clients he represents or the ideas he espouses in public debate.

A Free and Independent Bar.

By "a free and independent bar" we do not mean to imply any special privileges for lawyers. Nor do we suggest that lawyers may be free to flout the laws to which their fellow citizens are subject.

It is the sworn duty of the lawyer to protect and defend the Constitution and the laws of the land. Correlative, we think, is the obligation of society to permit

the lawyer to arrive at his own concepts of right and justice and of what the law is or should be, and to carry out his duties as a lawyer without fear of governmental reprisal for lack of orthodoxy.

The Lawyer's Duties.

The essence of these obligations have been simply but eloquently expressed by Henry L. Stimson:[1]

> "Through many channels I came to learn and understand the noble history of the profession of the law. I came to realize that without a bar trained in the traditions of courage and loyalty our constitutional theories of individual liberty would cease to be a living reality. I learned of the experience of those many countries possessing constitutions and bills of rights similar to our own whose citizens had nevertheless lost their liberties because they did not possess a bar with sufficient courage and independence to establish those rights by a brave assertion of the writs of habeas corpus and certiorari. So I came to feel that the American lawyer should regard himself as a potential officer of his government and a defender of its laws and constitution. I felt that if the time should ever come when this tradition had faded out and the members of the bar had become merely the servants of business, the future of our liberties would be gloomy indeed."

Many of the signers of this brief disagree with many, if not all, of the positions taken by the Guild from time to time. But all of us believe whole heartedly in the *right* of the Guild to have taken and to have asserted vigor-

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[1]Henry L. Stimson—Introduction, page XXI—On Active Service in Peace and War—Stimson and Bundy.

ously whatever position it chose on matters of public interest before legislative committees, in the courts, at State Bar Conventions (as here in California) and in all media of open public discussion, free of the fear that any such expression might subsequently lay it open to a charge of subversion.

The lawyer's duties arise out of the fundamental rights of all others. Out of these duties arise rights of the lawyer which must be recognized as, in a sense, unique to him.

Representation of Clients.

One of the fundamental rights of all persons is to be represented by counsel if charged with a crime. The Chief Justice has recently—in considering the very principle with which we are here concerned—pointed out that this was more than a mere *pro forma* right but rather, the right to be "effectively" represented.[2] Out of this right, common to all, arises the concomitant duty of the lawyer to afford such representation and, out of that duty, *his right* to be free from the slightest stigma, obloquy, opprobrium or derogatory governmental action based in any way upon such representation.

The roots of the lawyer's duty in this respect go far back beyond even the existence of our nation, as does that tradition of "courage and independence" of the bar which afforded to everyone the right to be defended by counsel

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[2]"Does not the suspicion that has attached to lawyers who represent unpopular defendants indicate some departures from the constitutional principle that every person charged with crime is entitled to be effectively represented by counsel"—Address delivered February 19, 1955, at the opening assembly of Washington University's Second Century Convocation.

of his choice when charged with a crime, no matter how heinous or how offensive to the community. One of the classic examples in our history is, of course, the defense by John Adams and Josiah Quincy in 1770 of the British Soldiers charged with participating in the "Boston Massacre." Most apposite today are Adams' own words which in simple terms illuminate the depth of his conviction of the fundamental rights of the most hated of persons and the fundamental duty of the lawyer to protect those rights.

> "The next morning (after the night of the Boston Massacre), I think it was, sitting in my office, near the steps of the town-house stairs, Mr. Forrest came in, who was then called the Irish Infant. I had some acquaintance with him. With tears streaming from his eyes, he said, 'I am come with a very solemn message from a very unfortunate man, Captain Preston, in prison. He wishes for counsel, and can get none. I have waited on Mr. Quincy, who says he will engage, if you will give him your assistance; without it, he positively will not. Even Mr. Auchmuty declines, unless you will engage.' I had no hesitation in answering that counsel ought to be the very last thing that an accused person should want in a free county; that the bar ought, in my opinion, to be independent and impartial, at all times and in every circumstance, and that persons whose lives were at stake ought to have the counsel they preferred."[3]

It is inconceivable that those who wrote the Bill of Rights into our Constitution did not believe that this duty of the lawyer carried with it the right to be free of any harmful consequences or sanctions sought to be imposed

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[3]From John Adams' Autobiography—The Selected Writings of John Adams and John Quincy Adams, Edited by Koch and Peden, page 29.

upon him by government as a result of pursuing this duty, for it is so obvious as to need no laboring that the lawyer cannot effectively represent a defendant to the fullest of his ability if his efforts must be rendered under the shadow of possible future attainder.

The right of the lawyer to represent the meanest or most despised defendant, free of stigma and certainly free of governmental reprisal is perhaps one of the highest rights in our society. For it is a right which is not merely personal to the lawyers but one which he holds for the benefit of the entire community. And thus the state does not hesitate to charge him explicitly with this duty for the benefit of all its members.

The Right to Counsel.

In our own state all lawyers are bidden by express statutory commandment, "never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed."[4]

The Board of Governors of the State Bar of California has recently vigorously reaffirmed the right and duty of the lawyers of this state to represent defendants in unpopular causes, pointing specifically to those charged with violation of the Smith Act.

> "The attention of the Board of Governors has been called to the fact that a number of lawyers, who might otherwise be willing to accept representation of defendants in Smith Act or similarly unpopular causes, are declining such representation because of the fear of economic consequences and personal stigma. It is well, therefore, to commend to the

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[4]California Business and Professions Code, Section 6068(h).

consideration of the lawyers of this State the declaration of principles recently adopted by the Conference of State Bar Delegates and which the Board hereby approves:

" 'RESOLVED that the Conference of State Bar Delegates recognizes that the right of counsel requires public acceptance of the correlative right of a lawyer to represent and defend, in accordance with the standards of ethics of the Bar, any client without having imputed to him his client's reputation, view or character.' "[5]

The American Bar Association has similarly stressed "the right of defendants to the benefit of assistance of counsel and the duty of the Bar to provide such aid even to the most unpopular defendants."[6] In its declaration of these principles the Association resolved that it would "continue to educate the profession and the public to the rights and duties of a lawyer in representing any client, regardless of the unpopularity of either the client or his cause."[7]

To charge, therefore, that an association of lawyers is subversive because some of its members have appeared as counsel for Communists is nothing less than a command to the bar to disregard its solemn duty in this respect. Such a command, coming from an unofficial body, may be disregarded and presents no problem for this Court. But such a command, made under guise of governmental authority, is an unconstitutional invasion of the rights of lawyers and when appropriately challenged, as it has

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[5]Los Angeles Daily Journal, August 16, 1955.

[6]*Ibid.*

[7]*Ibid.*

been by the National Lawyers Guild, should be struck down promptly. Certainly it is a matter which this Court should consider and pass upon before lawyers are put to the task of justifying, under the cloud of a charge of subversion, the defense of anyone charged with crime.

Lawyers as Friends of the Court.

Equally with the duty of representing persons whose views are unpopular, our legal tradition gives members of the bar the right and imposes upon them the duty of presenting to the courts their views, not as advocates but as friends of the Court, when in their judgment problems important to the society as a whole or to a considerable portion of it are before the courts for decision. We would feel that tradition was being ignobly traduced if the presentation of our views in this brief were, at some future date, to be used as the basis of a charge of subversion against us or against any association of which we are members. More, this would be a clear-cut violation of our rights under the First Amendment. We cannot, therefore, look with equanimity—or with less concern than if we ourselves were parties—upon an action which seeks to declare a bar association subversive because it has filed *amicus curiae* briefs with the Courts in cases which it deemed to present problems important to the community at large. Whether or not we, ourselves, would consider it incumbent upon us to file such briefs in all or any of those cases or whether we would have taken the same positions as the Guild took does not concern us. It is likely that many of us might have differed considerably from many of the views expressed by the Guild in those briefs. But we are informed that in no case has any court ever suggested that any *amicus* brief filed by the Guild was filed in bad faith or in any fashion exceeded the bounds of

legal propriety. The right of the Guild and its members to file such briefs, free of the thought of future penalties, is an incontestable right possessed by every member of the Bar.

Let that right and that duty of those who are officers of the Courts be denied to a part of the Bar and the rights of the entire Bar are imperiled. This is more than merely a matter of what ought to be valid social policy—such a deprivation of lawyer's duties, is, we submit, prohibited by the Constitution.

Lawyers as Leaders in Society.

Equal, too, with these duties is the duty of the lawyer to give what leadership he can in the formulation of the laws under which we live. This duty may not be spelled out with the same measure of preciseness as the other duties to which we have adverted, but it is a fact that the lawyer has in our country traditionally led in the initiation of the laws of our land, in the public discussion and debate about the law and, to the great credit of the profession, in the opposition to unjust and oppressive laws. Of necessity, this is so because of the very nature of our profession. Lawyers, whose lives are spent in dealing with laws, are bound to be more concerned with the law at every stage—even before it becomes law—than any other group in the community.

Whether we turn to the writing of the Declaration of Independence, the fashioning of the Constitution, or the composition of state and national legislatures over our entire history, such great discussions of our laws as the Lincoln-Douglas debates, the leadership of the opposition to the iniquitous Alien and Sedition Laws, the solemn indignation and protest of some of the most conservative

members of the New York Bar over the expulsion of five Socialist members of the New York Legislature in 1920 or to countless other similar examples we find, no matter where we look in the pages of American history, the lawyer vigorously in the lead and actively participating in all matters involving our laws.

Thus, we are advised, the members of the National Lawyers Guild, through their association, have taken the frequently unpopular position on a variety of controversial issues. The nature of the positions it has taken represents one of the important grounds on which the Attorney General seeks to stigmatize the Guild and the thousands of lawyers who are still among its members as "subversive."

Here, too, we have not inquired specifically into the position which the Guild has taken on these and similar matters. And here, too, we assume that in some, if not many, instances they differ materially from the views which many of us may have on these matters. We assume, further, that on each, the position of the Guild is directly contrary to that of the Attorney General and his more recent predecessors in office. We do not need to point out that so, too, is the considered judicial opinion of members of this Court—in some instances, of the majority of this Court. In order to make clear our belief that no matter how diametrically opposed may be the views of any of us those of the Guild, we conceive it to be a gross and unwarranted invasion of the lawyer's rights under the First Amendment to seek to deprive him of the right to think as he will and to express freely his views, singly or in concert with his fellow lawyers, in any issue before the community, under pain of being officially branded as "subversive."

The Asserted Political Views and Associations of Some Guild Members and Leaders.

Concerning this we are informed that the Guild, unlike the Attorney General, makes no political inquiry of its members. Traditionally, this has been the practice of all bar associations. But irrespective of the merits of either the Guild's or the Attorney General's approach to this problem it would seem more nearly consonant with the spirit of our constitution to judge an organization, not by what some of its members have said and done, but by what as an organization, it has said or done.

It may have been true several thousand years ago that "Rare and happy are the times when we think what we please and express what we think,"[8] but the framers of our Constitution, fully cognizant of the rarity of such times under oppressive government sought by the Bill of Rights to ensure that such times should not be rare in this land but should exist always. "The men of our First Congress knew, as we may be in danger of forgetting, that each element in the Bill of Rights was a painfully won acquisition."[9]

It is not lightly that we have undertaken to set before this Court our views on the basic rights of lawyers in our society. We understand full well the responsibility which rests upon each of us, on an occasion like this. To use the words of John Adams[10] we know that in what we say there must be "no art or address, no sophistry or prevarication, in such a cause, nor anything more than

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[8]Tacitus, The History, Book I, 1.

[9]Mr. Chief Justice Warren, *op. cit.*

[10]John Adams, *op. cit., supra,* note 3.

fact, evidence and law would justify." We have, therefore, sought to weigh as carefully as we could each word which we have here set down, to avoid even the shadow of overstatement and to limit ourselves to an expression of such of our views on the very fundamental problem involved here which we feel may be of some help to this Court in the consideration of the issue before it.

Respectfully submitted,

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